In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1204

SAM G. MYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted on three counts of violating Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C. 7201) by wilfully attempting to defeat and evade his personal income taxes for 1957 and 1958 and the taxes of his corporation for the year ending January 31, 1959. He was acquitted on a fourth count charging evasion of corporate taxes for the year ending January 31, 1958 (R. 709). Petitioner was sentenced to serve a joint sentence of five years' imprisonment on the three counts for which he was convicted (R. 750).

During the years involved in the indictment, petitioner was president of a corporation which was engaged in the air-conditioning business. He was in

216-998—66

active charge of operations throughout this period, and acquired all of the stock in 1957 by buying the shares held by Joe Stahl, who had originally financed the corporation. At the time he bought Stahl's shares petitioner explained that he was in tax trouble and that he did not want to involve Stahl. (R. 98–103, 354–358.)

There was evidence that petitioner caused substantial amounts of taxable income to be omitted both from his personal returns and from the corporation's returns. Thus, personal expenses of petitioner's family, such as a mink coat, movie equipment, a piano, and landscaping the grounds of petitioner's home, were paid for by the corporation and deducted as business expenditures, and they were not reported on petitioner's personal returns. (R. 550–562.) Petitioner's accountant followed petitioner's instructions in his treatment of all such items both in the corporate books and in the income-tax returns (R. 466–490), even though he was aware of the illegality of his actions (R. 499–500). In addition, petitioner diverted corporate income to himself without reporting it on his own returns. For example, a supplier of air-conditioners owed the corporation $50,000 as reimbursement of warranty expense incurred by the corporation. A check for the full amount was made out to petitioner personally and deposited in his personal account. The accountant who made out the personal and corporate returns was never informed of this transaction. (R. 188, 204, 236, 241, 459, 483.) An additional $51,212.06, representing rebates from finance companies to the corporation, was likewise

diverted to petitioner, and the accountant was instructed not to record this amount in either corporate books or the personal or corporate tax returns (R. 151, 467, 468, 567–575).

1. Petitioner's contention (Pet. 5) that the nature of a "gift" for income tax purposes was not properly explained to the jury is without merit. His counsel had argued to the jury that the $50,000 check—representing a reimbursement of warranty expense incurred by the corporation—was a "gift," mainly because it had been issued to petitioner personally rather than to the corporation (R. 633). After retiring, the jury in writing requested instruction on whether the check would be taxable if a "gift" (R. 699–700). The instruction thereupon given by the trial court [1] was

[1] The instruction appears at R. 701–702:

> Now, you inquire if the $50,000 item was a gift to the defendant, would he have had to pay a personal income tax on it, or would the corporation have to pay a tax on it.
>
> If in fact it was a gift in the statutory sense, that is, if it was a gift as that term is used in the tax laws, it would not be taxable either to the individual or to the corporation. But a gift, as that term is used in the tax laws, is not necessarily a gift as that term is commonly used and understood.
>
> In considering whether this payment was or was not a gift for tax purposes, I give you this instruction as to what is or is not a gift, as the term is used in the tax statutes:
>
> "A voluntarily executed transfer of his property by one to another, without any consideration or compensation therefor, though it might be a common law gift, is not necessarily a gift within the meaning of the tax statute. The mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. And, importantly, if the payment proceeds

clearly correct, being drafted almost verbatim from the language in *Commissioner* v. *Duberstein*, 363 U.S. 278. See also *United States* v. *Pixton*, 326 F. 2d 626, 628 (C.A. 5); *Estate of Cronheim* v. *Commissioner*, 323 F. 2d 706, 707 (C.A. 8); *Gaugler* v. *United States*, 312 F. 2d 681, 685 (C.A. 2); *Landry* v. *United States*, 227 F. Supp. 631, 634 (E.D. La.).

2. Contrary to petitioner's contention (Pet. 4), the "substantiality" requirement in tax evasion cases was adequately explained to the jury. The indictment alleged that petitioner attempted to evade "a large part of the income taxes due" (R. 11–14). The court instructed the jury that they must find that petitioner "attempted to evade a substantial part" of the tax (R. 684). The jury asked for instruction whether a large or substantial amount would be left if the $50,000 check was eliminated, and the court instructed them that (R. 700):

> I cannot answer your question categorically as to what percentage of a man's income tax he must undertake to evade for it to constitute a substantial or large part thereof. That is a matter upon which I think your common sense and good judgment must be the solution.

---

primarily from the constraining force of any moral or legal duty, or from the incentive of anticipated benefit of an economic nature, it is not a gift. And conversely, where the payment is in return for services rendered, it is irrelevant that the donor receives no economic benefit from it. A gift, in the statutory sense, proceeds from a detached and disinterested generosity, out of affection, respect, admiration, charity, or like impulses. The most critical consideration is the transferor's intention."

That is a definition of gift as used in the statute, the tax statutes.

> The word "substantial" is defined, the ordinary everyday definition, which comes from a dictionary—it does not have any particular legal signification here—is in this fashion: Substantial means considerable in amount, value or the like. Large, as a substantial gain.

The court then reviewed with the jury (R. 703–704) how eliminating the $50,000 from Count 1 would leave $20,000 personal taxable income and tax due of $5,484 (versus reported income of $8,000 and reported tax of $1,800), while Count 3 would be reduced to $67,000 corporate taxable income and $29,885 tax due (versus reported income of $46,000 and tax due of $18,500). The jury foreman assured the court that this answered the jury's question. (R. 704.) In answer to the further question by a juror (R. 704) whether "substantial" or "large" was judged by the amount actually due or by the amount reported, the court pointed out that the indictment itself supplied the answer in referring to "a large part of the tax that was in fact due" (R. 705).

The court's answers to the jury's questions were clear and correct as a matter of law. In all events, no possibility of prejudice could exist since the unreported tax, aside from the $50,000 check, was substantial under any of the various formulations of the relevant test, *i.e.*, it was "substantially in excess of that reported" (*United States* v. *Alker*, 260 F. 2d 135, 140 (C.A. 3)), "greater than sums relatively small under the particular circumstances" (*United States* v. *Beck*, 59–2 U.S.T.C., par. 9486 (W.D. Wash.)), and more than "a few thousand dollars of omissions of taxable

income" (*United States* v. *Nunan*, 236 F. 2d 576 (C.A. 2)).

3. Petitioner's other contentions are without merit. The propriety of the form of the government's summary exhibit was reviewed and approved by the court of appeals after a careful examination by the court of the contents of the summary, its relationship to the record, and the instructions accompanying its submission to the jury (Pet. App. A4). The court of appeals has been alert in other cases to check abuse of this type of document. *Steele* v. *United States*, 222 F. 2d 628 (C.A. 5). Although petitioner's counsel informed the court that he had seen a juror taking notes (R. 325), he requested no action by the court (R. 330), and the trial court may exercise discretion in regulating note taking. *Goodloe* v. *United States*, 188 F. 2d 621 (C.A. D.C.), certiorari denied, 342 U.S. 819; *United States* v. *Chiarella*, 184 F. 2d 903, 907 (C.A. 2); *Chicago & N.W. Ry. Co.* v. *Kelly*, 84 F. 2d 569, 577 (C.A. 8); *Toles* v. *United States*, 308 F. 2d 590, 594 (C.A. 9), certiorari denied, 375 U.S. 836.

The "inflammatory and prejudicial remarks" attributed by petitioner to the prosecutor (Pet. 4) were arguments to the jury that petitioner's counsel would have produced explanatory defense evidence if any such had been available (R. 603, 661, 669) and that the government's evidence was uncontradicted (R. 605, 616, 663). This is proper argument. *Kampmeyer* v. *United States*, 227 F. 2d 313, 323 (C.A. 8); *Jordan* v. *United States*, 324 F. 2d 178 (C.A. 5); *Davis* v. *United States*, 279 F. 2d 127 (C. A. 4), cer-

tiorari denied *sub nom. Cope* v. *United States,* 364 U.S. 822.

Finally, it was not error to deny petitioner's supplemental new trial motion, based upon alleged jury misconduct, without a hearing (Pet. 3). Orders denying new trials relative to juror misconduct are reviewable only for abuse of discretion (*Little* v. *United States,* 331 F. 2d 287, 295 (C.A. 8), certiorari denied, 379 U.S. 834; *United States* v. *Fancher,* 319 F. 2d 604, 606 (C.A. 2)), and it is only the exceptional case where an oral hearing should be allowed on such a motion. *Lyles* v. *United States,* 272 F. 2d 910, 912 (C.A. 5), certiorari denied, 356 U.S. 931; *United States* v. *Crowder,* 351 F. 2d 101, 104 (C.A. 6). The trial court's order, moreover, recited that no hearing had been requested by petitioner with regard to this motion.

The petition for writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966